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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LUIS ALBERTO GUTIERREZ, Defendant and Appellant.	B208170 (Los Angeles County Super. Ct. No. VA104051)

APPEAL from a judgment of the Superior Court of Los Angeles County, Margaret Miller Bernal, Judge. Affirmed.

Joanie P. Chen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

On April 25, 2008, a jury found appellant Luis Alberto Gutierrez (Gutierrez) guilty of one count of second degree robbery (Pen. Code, § 211)[1] and found the allegation that he personally used a firearm during the commission of the robbery to be true. (§ 12022.53, subd. (b).)[2] The trial court sentenced Gutierrez to the high term of five years for the robbery, plus a 10-year consecutive term pursuant to section 12022.53, subd. (b), and a two-year consecutive term pursuant to section 12022.1, for a total term of 17 years.

Gutierrez appeals, contending the trial court erred by: (1) finding the victim unavailable and then allowing use of his preliminary hearing testimony at trial; (2) excluding a late-found witness's testimony; and (3) admitting the unavailable victim's statement to one of the police officers in violation of Gutierrez's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. We conclude the trial court committed harmless error in admitting the victim's testimonial hearsay in violation of the Confrontation Clause and determine his other contentions lack merit. We therefore affirm the judgment.

BACKGROUND[3]

On December 30, 2007, at about 3:30 p.m. in Maywood, California, ice cream vendor Benito Hernandez Ortiz (Hernandez) was pushing his cart along the sidewalk when he felt the barrel of a gun pressed against his neck. He raised his arms and turned to face his assailant. The assailant (Gutierrez) demanded money and "what [Hernandez] had." Hernandez "tried to tell him, grab him, tell him no," but Gutierrez threatened to

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

[2] The Abstract of Judgment indicates Gutierrez was sentenced under subdivision (d) of section 12022.53. The jury's verdict and the minute order both refer to subdivision (b), as do the Information and the Reporter's Transcript.

[3] The facts below are drawn from the evidence presented at trial.

kill him, so Hernandez gave Gutierrez approximately $136[4] and Hernandez's cell phone. Hernandez recalled that Gutierrez wore a light green and white striped short-sleeved shirt and long pants, that he was clean shaven, and that he was not wearing a hat.[5] Hernandez told the police that Gutierrez took the money and cell phone from Hernandez's left pocket. After taking the money and phone, Gutierrez went southbound toward Atlantic.

As it happened, Los Angeles County Sheriff's Deputy Fabian Munoz was at a friend's house and saw the two men, later identified as Gutierrez and Hernandez,[6] "roughhousing." Munoz was approximately 40 feet from them and had a clear view of the men. Munoz continued watching from the back door, then stepped outside. The men separated, and one ran away.

Munoz saw a gun in the hand of the man running from the scene and called the Maywood Police Department. He pursued Gutierrez on foot, remaining on his cell phone to give the Maywood Police dispatcher directions.

Officer Dennis Azevedo responded to the dispatcher's call. Maywood police officers picked up the pursuit. Azevedo saw two male Hispanics pointing eastward down the sidewalk toward Pine Street and heard them shout, "He's the one that did it." Azevedo caught sight of Gutierrez looking into the fenced area of the post office located on Pine Street between Slauson and 58th Street. Believing that a robbery had just

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[4] When first asked, Hernandez testified that he gave Gutierrez $137.30. Hernandez then agreed the amount was "$136 . . . [¶] . . . and change."

[5] At trial, the testimony about Gutierrez's clothing and facial hair was inconclusive: referrals were inconsistent or forgotten. We do not recount this testimony because, as set forth below, the record establishes that Gutierrez was never out of view of at least one law enforcement officer for more than a few seconds from the instant the crime was committed until the moment Gutierrez was apprehended.

[6] At trial, Munoz identified Gutierrez as the man he saw running away and confirmed that he had seen the other man, Hernandez, "at a previous hearing where he testified."

occurred, Azevedo got out of his vehicle, drew his weapon, pointed it at Gutierrez and ordered him to put his hands over his head. Gutierrez fidgeted then fled. Azevedo briefly lost sight of Gutierrez as he ran through an "open" building; at that time, Azevedo observed Sergeant Villegas pick up the pursuit of Gutierrez when he exited the building. Azevedo caught up with the parties at a barbershop on Slauson Avenue less than a minute later and observed Sergeant Villegas struggling with Gutierrez. Azevedo also observed the gun on a short bar stool.[7]

Munoz, too, had briefly lost sight of Gutierrez , but the police dispatcher directed him to the barbershop on Slauson Avenue. Munoz saw Gutierrez "wrestling" with Villegas. Munoz identified Gutierrez as the suspect he had followed from the crime scene. Munoz recalled that Gutierrez was wearing a big, loose, collared shirt with horizontal stripes and baggy pants, as well as a baseball cap. At trial, Munoz could not recall whether Gutierrez was wearing glasses or whether he had facial hair.

Officer Frank Menchaca of the Maywood Police Department began investigating the robbery immediately after Gutierrez was apprehended. Pursuant to that investigation, Menchaca searched Gutierrez and recovered "currency from his pant pocket, a set of keys and a cell phone." Menchaca testified at trial as follows: he recovered the sum of $136.67 from Gutierrez. Menchaca transported Gutierrez to the police station. Menchaca spoke with victim Hernandez, who told him the precise amount of money he had lost in the robbery.[8] Hernandez told Menchaca he knew the amount ($136.67) because he had to tell his employer the exact figure every day when he finished selling ice cream. Menchaca recalled that Hernandez stated, "Yes, that is mine," when Menchaca displayed the currency and the cell phone recovered from Gutierrez on a table and showed it to Hernandez. Hernandez also "picked [the cell phone] up, opened it, said,

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[7] At trial, Azevedo identified the weapon as the gun he saw on the stool.

[8] Critically, there was no objection at trial to Officer Menchaca's testimony regarding these matters.

"These are my numbers and information. This [is] my cell phone." Menchaca saw the numbers and information on the cell phone. Defense counsel objected to the first statement, "Yes, that is mine," as hearsay, which the trial court overruled. Defense counsel did not object the second time, when Hernandez said: "This [is] my cell phone."

Gutierrez was charged with one count of second degree robbery (§ 211); the People further alleged that he committed the offense for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)), that he personally used a firearm (§ 12022.53, subd. (b)), and that at the time he committed the robbery, he was released from custody on bail or own recognizance in another case (§ 12022.1). The gang enhancement was subsequently dismissed. The jury found Gutierrez guilty of second degree robbery and found the other two enhancement allegations to be true.

The trial court sentenced Gutierrez to the high term of five years, plus 10 years for the firearm enhancement and two years for committing the offense while on probation.

This timely appeal followed.

DISCUSSION

A. Hernandez Was Unavailable at the Time of Trial.

Gutierrez contends the trial court committed reversible error in declaring Hernandez an unavailable witness and allowing the prosecution to introduce his preliminary hearing testimony at trial. Gutierrez maintains the trial court violated his rights to due process and confrontation under the Sixth and Fourteenth Amendments to the United States Constitution. We disagree.

1. Applicable law

Reasonable Diligence

"A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him [or her]. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right, however, is not absolute. The high court . . . reaffirmed the long-standing exception that '[t]estimonial statements of witnesses absent from trial have been

admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 340, quoting *Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354] (*Crawford*).) "Evidence Code section 1291 codifies this traditional exception." (*People v. Wilson, supra*, 36 Cal.4th at p. 340.) "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]'" (*Ibid*., quoting *People v. Mayfield* (1997) 14 Cal.4th 668, 742.)

"Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is 'unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.' . . . Evidence Code section 240, subdivision (a)(5), states a declarant is 'unavailable as a witness' if [he or she] is '[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.'" (*People v. Wilson, supra*, 36 Cal.4th at p. 341.)

The term 'reasonable diligence' or 'due diligence' under Evidence Code section 240, subdivision (a)(5) """connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]""" (*People v. Wilson, supra*, 36 Cal.4th at p. 341, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 904 ["reasonable diligence same as due diligence"].) To determine whether a party has exercised reasonable or due diligence to locate and produce a witness at trial, courts consider the following: the totality of the efforts undertaken, including the character of the proponent's efforts; whether the search was timely begun; the importance of the witness's testimony; whether leads were competently explored; whether the proponent reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena the witness when he or she was available; and whether the witness would have

been produced if reasonable diligence had been exercised. (*People v. Cromer*, *supra*, 24 Cal.4th at p. 904; *People v. Sanders* (1995) 11 Cal.4th 475, 523.) The fact that the proponent of the evidence could have taken some further or additional step does not render his or her efforts unreasonable; reasonable diligence is all that is required. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 342; *People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) "[A]ppellate courts should independently review a trial court's determination that the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*People v. Cromer*, *supra*, 24 Cal.4th at p. 901.)

***Crawford* Implications**

In *Crawford*, the United States Supreme Court overruled *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531], which had allowed out-of-court statements to be admitted at trial upon a showing of sufficient indicia of reliability. (*Crawford*, *supra*, 541 U.S. at pp. 60–67.) The Supreme Court concluded that where "testimonial" evidence is involved, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id*. at p. 68) While the Supreme Court declined at that point to provide a comprehensive definition of "'testimonial'" (*ibid*.), it stated that it includes "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id*. at p. 52) The Court stated that "at a minimum" the term "testimonial" applies "to police interrogations." (*Id*. at p. 68.)

In *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266] (*Davis*), the Supreme Court elaborated on the requirements for testimonial statements and "determine[d] more precisely which police interrogations produce testimony" subject to the Confrontation Clause. (*Id*. at p. 822.) In making that determination, the Supreme Court held that, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id.* at p. 822.) Interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are clearly testimonial, "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer." (*Id*. at p. 826.)

To determine whether an individual is acting as a witness and in essence testifying so as to require confrontation, all of the surrounding circumstances must be considered, including (1) when the statements were made (were the events ongoing), (2) the nature of the report given, (3) the level of formality when the statements were made, and (4) the purpose of obtaining the statements. (*Davis, supra,* at pp. 826–827.)

In *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), the California Supreme Court granted review to consider the applicability of *Crawford* (*id.* at p. 975): there, the defendant was convicted of aggravated assault for slashing her 15-year-old son across the face with a piece of glass. (*Id*. at p. 970.) The Supreme Court concluded that the victim's two statements to police (one at the hospital, the other at the police station) were testimonial, while the statement to the emergency room doctor was not because its primary purpose was to assist the doctor in treating the victim. Statements elicited by law enforcement officials are not testimonial if the primary purpose is to deal with a contemporaneous emergency rather than to produce evidence about past events. (*Id*. at p. 984.)

2. Prosecution efforts to locate Hernandez

The preliminary hearing was held on January 29, 2008. Victim Hernandez was present and testified about the robbery.

On or about April 16, 2008, six days before trial started, Investigator Stephen Koval of the district attorney's office was asked to begin an investigation as to Hernandez's whereabouts. Koval knew the telephone number for Hernandez had been tried without success, so he went to Hernandez's last known address. Koval determined Hernandez was not living at that address. He contacted a neighbor who told Koval she

knew Hernandez and that he had lived at the address several months ago, but "he had left along with everybody else that lived at this address."

Koval next spoke with the property owner, who informed Koval that he had rented the back unit to Margarita Aguirre and that she had had other people living with her. The property owner did not know Hernandez, but told Koval that Aguirre had moved about three months earlier. The property owner had no further information about the people who had lived in the back unit and no forwarding addresses for any of them. Koval checked with the post office and learned there had been no mail forwarding requests for that address in Benito Hernandez's name.

Koval went to the area where Hernandez had been an ice cream vendor and talked with two other vendors. They told Koval they all worked for a company named Monte's Ice Cream, based in Ontario. The two vendors knew Hernandez by description and were aware of the robbery. They told Koval they had not seen Hernandez for several months.

Koval contacted the owner of Monte's Ice Cream, Gabriel Rodriguez. Rodriguez knew Hernandez and was also aware of the robbery. Hernandez had left his employment; Rodriguez had not seen him "for three or four months, not since January." Rodriguez had no forwarding information for Hernandez.

Koval contacted three local hospitals: Los Angeles County Hospital, Harbor General Hospital, and St. Francis Hospital. He also contacted the Coroner's office. There was no record of Hernandez or a John Doe that might have matched his description.

Koval ran law enforcement computer checks and found no record of arrests or any other criminal history. He also checked an Immigration and Customs Enforcement (ICE) database and learned that Hernandez may have used another name, Jorge Cruz. The "last record they had of Jorge Cruz was in the year 2000, that he was deported. That was it." Koval did not check immigration control.

3. Analysis

Gutierrez argues that "leads were not competently explored." He maintains Koval should have searched for Margarita Aguirre, "Jorge Cruz," and "Benito Hernandez

Ortiz." In addition, Gutierrez claims it was "highly probable" that the prosecution knew Hernandez took a risk in testifying to a robbery with "possible gang ties." He argues that "[c]ommon sense dictates" the victim would be reluctant to return to court and that it was "highly probable" the prosecution knew of Hernandez's immigration status and any aliases before calling him to testify at the preliminary hearing. Gutierrez speculates that "[i]f indeed" Hernandez had been deported in 2000, he would be reluctant to return to court "for fear of another deportation."

Our independent review of the evidence persuades us that the prosecution made a sufficient, albeit not overwhelming, showing of reasonable diligence. First, we agree that the prosecution's initiation of efforts to locate Hernandez six days before trial was not particularly timely. While not as late as some investigations (see *People v. Avila* (2005) 131 Cal.App.4th 163, 169 ["Waiting until the morning a trial begins to try to locate a witness after being out of touch for several months is generally not prudent or reasonable, and certainly is not an untiring effort to secure a witness's presence at trial."]), the relatively late start brought with it inherent limitations: only so much can be accomplished in such a brief timeframe. By the same token, there is no evidence in the instant record that the prosecution had any reason to believe Hernandez—the victim—would not be available to testify. (*People v. Wise* (1994) 25 Cal.App.4th 339, 343–344 [no reason for prosecution to believe citizen-victim would disappear].) There also is no factual basis for a conclusion that Hernandez made himself unavailable.

The record reveals, as set forth above, that the prosecution acted in good faith and otherwise made appropriate efforts to find Hernandez. Gutierrez's suggestion of additional steps the prosecution might have taken does not necessarily render its actions unreasonable; the law requires only reasonable efforts, not "'prescient perfection.' [Citation.]" (*People v. Diaz, supra*, 95 Cal.App.4th at p. 706.) We detect nothing perfunctory or indifferent about the search. Indeed, among other efforts, Investigator Koval personally visited Hernandez's former residence and former place of employment; he contacted Hernandez's former neighbor, landlord, fellow vendors, and employer, as well as local hospitals and the coroner. We do not doubt that the prosecution could have

done more, especially if it had maintained communication with Hernandez or started searching for him sooner. The prosecution has no obligation to keep "periodic tabs" on material witnesses, however—particularly when they have no reason to believe a witness has disappeared. (*People v. Hovey* (1988) 44 Cal.3d 543, 564.) Considering the totality of the efforts the prosecution actually undertook, we conclude the prosecution met its burden to establish that it exercised due diligence in its attempt to locate Hernandez. Hernandez was "unavailable," and admission of his preliminary hearing testimony was not error.

Our conclusion that there was no error in admitting Hernandez's preliminary hearing testimony holds true for our analysis of Gutierrez's constitutional claim, as well. As we discussed, the preliminary hearing testimony falls squarely within the definition of testimonial hearsay under *Crawford* and *Davis*. In particular, Hernandez's statements were made long after the emergency had ended, the "report" was in the form of testimony, the formality of the hearing was akin to a trial, and Hernandez's testimony was unquestionably obtained to aid in prosecuting Gutierrez. (*Davis*, *supra*, at pp. 826–827.) The salient factors for purposes of *Crawford* are whether Gutierrez had an opportunity to cross-examine Hernandez and whether Hernandez was unavailable at the time of trial. For the reasons stated above, Hernandez was unavailable. And Gutierrez plainly had an opportunity to cross-examine his victim at the preliminary hearing. At the preliminary hearing, Gutierrez had a similar interest and motive to those he would have had at trial: undermining Hernandez's identification of Gutierrez as the robber. In these circumstances, there was no Confrontation Clause violation or state evidentiary error in admission of Hernandez's preliminary hearing testimony. We reject Gutierrez's contentions to the contrary.

B. The Trial Court Properly Excluded the Late-Proffered and Irrelevant Testimony of Juanita Jacovo

Gutierrez next contends the trial court violated his constitutional rights to a fair trial and due process, and his right to present a defense when it denied as irrelevant the defense's untimely request for potential witness Juanita Jacovo to testify that she had

paid Gutierrez $100 the day before the robbery for work Gutierrez performed on her driveway. Gutierrez maintains the testimony was relevant to his mistaken identity defense in that the prosecution's case included two different amounts that were stolen,[9] and Jacovo's testimony would have supported his reasonable doubt argument. Respondent argues that Gutierrez failed to object on constitutional grounds at trial and therefore forfeited these objections. Even if not forfeited, the proffered testimony was neither timely nor relevant, and any error was harmless. As we conclude the testimony was untimely and irrelevant, there was no abuse of discretion.

"Only relevant evidence is admissible (Evid. Code, §§ 210, 350), and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d); *People v. Heard* (2003) 31 Cal.4th 946, 972–973.) The test of relevance is whether the evidence '"tends "'logically, naturally, and by reasonable inference"' to establish material facts such as identity, intent, or motive.'" (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) We review for abuse of discretion a trial court's rulings on the admissibility of evidence. ([*People v.*] *Heard*, [*supra*, 31 Cal.4th] at pp. 972, 974; *People v. Rowland* (1992) 4 Cal.4th 238, 264.)" (*People v. Benavides* (2005) 35 Cal.4th 69, 90.)

Even without deciding whether Gutierrez forfeited his constitutional claims, his contention fails on the merits. First, the request for the proposed testimony on the first day of trial was unarguably untimely. Under section 1054.7, Gutierrez should have disclosed the witness's name and address at least 30 days before trial. (See also § 1054.3.) Gutierrez offered no explanation for his extremely belated request that the trial court allow Jacovo to testify. It strains credulity to suggest that Gutierrez had just

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9 At the preliminary hearing, Hernandez testified that he was robbed of $137.30. At trial, Menchaca testified that Hernandez had reported the sum involved as $136.67 and that Menchaca had recovered that same amount from Gutierrez.

learned about Jacovo in light of the proffer that Gutierrez had earned $100 for working on her driveway the day before the robbery.

In addition, Gutierrez concedes it was not possible to identify particular bills or coins, so Jacovo's testimony that she gave Gutierrez $100 bears no relationship to his defense that he had been mistakenly identified. Gutierrez's mistaken identity defense, after all, was predicated on Hernandez's description of the robber as clean shaven when Gutierrez had facial hair, as well as testimony that police momentarily lost sight of the assailant as he ran, in broad daylight, from the scene.

Defense counsel did nothing to establish a nexus between the proffered testimony and *any* fact truly at issue in the case. On the first day of trial, defense counsel stated he "just wanted to go on record saying that this is the first time I have seen this witness and I do not intend to call her; but the mother is insisting on that I proceed and call this witness." After the prosecutor objected on relevance grounds, defense counsel stated: "Well, Mr. Gutierrez is insisting on I call her, and for the record, I am requesting [that] the court allow me to call Juanita Jacovo and that is all I am going to say." The trial court did not abuse its discretion in refusing to allow Jacovo's testimony. In any event, the error was harmless under any standard. (*Chapman*, *supra*, 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Admission of Testimonial Hearsay Regarding the Victim's Statements During the Investigation Was Harmless Error

Gutierrez contends the trial court violated his constitutional rights under *Crawford, supra*, 541 U.S. 36, by admitting Menchaca's prejudicial hearsay statement that, during the investigation, victim Hernandez told Menchaca that the cell phone and cash retrieved from Gutierrez's pocket belonged to Hernandez. He argues that the statement, "Yes, that is mine," was hearsay because it was offered for the truth of the matter asserted. Moreover, the statement under *Crawford*, was testimonial in that Hernandez made his statement "not as a casual remark but as official testimony to be used later for the purpose of a criminal prosecution." We conclude that even assuming

admission of the statement violated the confrontation clause, the error was harmless beyond a reasonable doubt.

Gutierrez concedes he objected to the statement on hearsay grounds only.[10] Hearsay objections do not preserve Confrontation Clause issues for appellate review. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Catlin* (2001) 26 Cal.4th 81, 138, fn. 14.) A Confrontation Clause analysis is "distinctly different than that of a generalized hearsay problem." (*People v. Chaney* (2007) 148 Cal.App.4th 772, 779.) Notably, the analysis requires the court to determine whether the declarant is unavailable and whether the defendant had a prior opportunity to cross-examine the declarant. If both of these questions are answered in the affirmative, the Confrontation Clause will not bar the testimony. (*Crawford, supra,* 541 U.S. at pp. 53–54.) "A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Gutierrez's hearsay objection did not preserve the Confrontation Clause violation issue for appeal.

Even if the issue had not been forfeited, we conclude its merits do not undermine a finding of harmless error. As noted above, in *Crawford*, the United States Supreme Court concluded that where testimonial evidence is involved, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford, supra,* 541 U.S. at p. 68) We have already concluded that Hernandez was unavailable at trial within the meaning of *Crawford*. In contrast with the preliminary hearing, though, the station house questioning did not afford Gutierrez

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[10] Gutierrez did not object, we note, to the statements immediately following the objected-to testimony, including, "He picked it up, opened it, said, 'These are my numbers and information. This [is] my cell phone.'" Gutierrez's counsel also did not object to Menchaca's statement that he saw "numbers and information on the cell phone" or to Menchaca's agreement that the money and cell phone depicted in the People's Exhibit Number 3 showed the cell phone Menchaca had recovered from Gutierrez. Nowhere does Gutierrez suggest that such objections would have been futile. In light of the overwhelming evidence of Gutierrez's guilt, we do not address this failure further.

any opportunity to cross-examine Hernandez. The trial court erred in overruling Gutierrez's counsel's objection to Hernandez's statement that the cell phone was his.[11]

Violations of constitutional rights may nevertheless be harmless if shown to be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) The evidence recounted above leaves no question that any error in admitting Menchaca's hearsay testimony regarding Hernandez's statement at the police station was harmless beyond a reasonable doubt. Gutierrez was identified as the perpetrator of the robbery as a result of Hernandez's preliminary hearing identification and the police pursuit that led to his apprehension. Moreover, there was no objection to the testimony that immediately followed Menchaca's testimony that Hernandez said, "Yes, that is mine," when shown the cell phone Menchaca had recovered from Gutierrez. That subsequent testimony was equally damaging to Gutierrez:

"Q By Mr. Lamb: And was there some way for [Hernandez] to authenticate that the cell phone belonged to him?

"A [Menchaca]: Yes.

"Q What happened?

"A He picked it up, opened it, said, "These are my numbers and information. This is my cell phone."

"Q Did you see numbers and information on the cell phone?

"A Yes, I did.

[¶] . . . [¶]

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[11] According to the California Supreme Court, having found the testimony at issue to be hearsay and not subject to a state law exception, we need not reach the Confrontation Clause contention. (*Cage*, *supra*, 40 Cal.4th at p. 975, fn. 5 ["in any *Crawford* analysis, the first question for the trial court is whether proffered hearsay would fall under a recognized state law hearsay exception. If it does not, the matter is resolved, and no further *Crawford* analysis is required."].) As Gutierrez elected to argue this issue strictly on Confrontation Clause grounds, we address the matter accordingly.

"Q By Mr. Lamb: People's 3, is this the money and the cell phone that you recovered from the defendant?

"A That is correct.

"Q And was that property all returned to Benito Hernandez?

"A Yes, it was.

"Q By you?

"A Yes."

The trial court's error was restricted to the one statement to which Gutierrez's counsel objected.[12] The subsequent testimony—about the same issue—came in without objection and eliminated any reasonable doubt about the ownership of the cell phone. Taken together, the evidence of Gutierrez's guilt was overwhelming, and any error was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

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[12] Gutierrez forfeited any objection he may have had to the subsequent Menchaca statements. His counsel did not object at trial and does not raise the issue on appeal. Unlike our federal counterparts, California courts do not recognize a "rule of 'plain error review' . . . ." (*People v. Benavides*, *supra*, 35 Cal.4th 69, 115.) Lest there be any doubt, we conclude that the trial court's admission of Menchaca's testimony immediately after the objection did not "seriously affect the fairness, integrity or public reputation of judicial proceedings," so as to support the exercise of the court's "remedial discretion." (*U.S. v. Olano* (1993) 507 U.S. 725, 736 [113 S.Ct. 1770] [quoting *United States v. Atkinson* (1936) 297 U.S. 157, 160 [56 S.Ct. 391].) In short, for the reasons discussed above, there is no basis for a finding that Gutierrez was prejudiced by admission of the hearsay statements.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.